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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 544

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN AND THE STATE OF WISCONSIN,
Appellants,

vs.

THE STATE OF ILLINOIS,
Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

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The Scheffer Press, Inc.—Financial 6-2694



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In view of Appellee's motion for dismissal with which it concludes its statement opposing jurisdiction, the Appellant, pursuant to Rule 7(3) of this Court, presents this brief in opposition thereto.

The State of Illinois urges that the question of the constitutionality of the tax here involved is "not substantial". This is unsound. The question of constitutionality here raised is not formal or abstract. It is a question of real substance. The question was deemed sufficiently "substantial" by the Illinois Supreme Court to devote five pages of its opinion to it, but without meeting it (404 Ill. Adv. Sheets 193, 197-202).

The argument (Appellee's "Statement" p. 2) as to what taxes the State of Illinois *might have* imposed by legis-

lative action are immaterial. The tax in question is to be judged by the provisions of the law, and not by what might have been provided, but was not.

The Illinois Inheritance Tax is upon the "transfer • • • to persons, institutions or corporations" (Ill. Rev. Stats. 1943 Ch. 120, Sec. 375) and makes specific reference to the "beneficiary against whom the tax is assessed" (Ch. 120, Sec. 382 (d) and to "the persons, institutions or corporations liable for said tax" (Ch. 120, Sec. 390). The Appellee urges (p. 3) that the difference between such a tax on the recipient and a tax on the donor or his estate is one "of form and not of substance". But when the issue is whether the burden of the tax is a direct one, or merely an incidental one, the difference between a tax directly on the recipient and a tax on the donor or his estate becomes the controlling substantial consideration.

Appellee suggests (p. 4) that the decision below is an expounding of the Illinois Inheritance Tax Act; that for the purposes of this case the tax in question is an estate tax; and urges that this decision is "authoritative here". This is also erroneous. The opinion of the Illinois court does not repeal and could not erase the express language of the Act making the tax in question a tax on the recipient. It does not overrule the long line of decisions by the Illinois Supreme Court that the tax is on the recipient and raises a personal liability on the recipient. What the Court held in the instant case was that even though the tax is on the recipient, since the State of Illinois collects and siezes the tax prior to distribution, when it can, without in every instance resorting to a civil action against the recipient, that thus the tax is "extracted" from the legacy before the legatee receives it. The confusion and error inherent in this view of the Supreme Court of Illinois cannot properly be asserted as

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justification for an unconstitutional tax assessed directly against another State.

Respectfully submitted,

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